Supreme Court, U.S.
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NO. 83-5808

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

HENRY MARTINEZ PORTER,

Petitioner

V.

DAN V. McKASKLE, ACTING DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

WHETHER THE COURT BELOW CORRECTLY HELD THAT THERE WAS NO WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) ERROR BY THE TRIAL COURT'S EXCLUSION OF SIX VENIREMEN, EACH OF WHOM UNAMBIGUOUSLY AND UNEQUIVOCALLY ASSERTED IRREVOCABLE OPPOSITION TO IMPOSITION OF THE DEATH PENALTY.

II.

WHETHER PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO ORDER PETITIONER EXAMINED BY A PSYCHIATRIST WHERE THERE WAS NO EVIDENCE TO RAISE A QUESTION OF COMPETENCY TO STAND TRIAL.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, an files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Appeals below is published at 709 F.2d 944 (5th Cir. 1983), reh. denied, 715 F.2d 577 , and is reproduced in the appendix to the Petition for Writ of Certiorari, 1a-17a. The unpublished memorandum and order of the district court is reproduced in the appendix to the Petition for Writ of Certiorari, 18a-26a. The en banc opinion of the Texas

Court of Criminal Appeals is reported at 623 S.W.2d 374 (Tex.Crim.App. 1981), and is reproduced in the appendix to the Writ of Certiorari, 29a-41a.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1254(1) and 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claim upon the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Petitioner's statement of the course of proceedings an disposition below is correct.

B. Statement of Facts

The evidence presented relevant to Petitioner's competence to stand trial is best summarized by the court below, 709 F.2d 944, 952-53, and by the Texas Court of Criminal Appeals, 623 S.W.2d 374, 380.

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The issues presented involve only the application of well-settled constitutional principles to the facts involved herein.

The court below, correctly applying the guidelines established by this Court in Pate v. Robinson, 383 U.S. 375 (1966) and Drope v. Missouri, 420 U.S. 162 (1975), found no evidence in the record raising a bona fide doubt as to Petitioner's competency, so as to implicate his constitutional rights to a fair trial. Petitioner bases his claim of a history of mental disorders on a twenty-year-old probation report, containing a reference to one juvenile hospitalization. No other

evidence as to competency was presented. There was no violation of Estelle v. Smith, 451 U.S. 454 (1981), as no psychiatric testimony was offered at either phase of his trial.

The record in the instant case reflects no error under Witherspoon v. Illinois, 391 U.S. 510 (1968). Each of the six veniremen excluded for cause would have been unable to serve as fair and impartial jurors, based upon their opposition to the imposition of the death penalty. As such, no constitutional error is presented and this Court should decline to review this case.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on the writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special or important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists. Further, the Petition for Writ of Certiorari does not raise unsettled questions of law. The issues addressed involve nothing more than the application of well-settled constitutional principles to the facts of this case. Thus, no important question of law is presented herein.

II.

THE COURT BELOW CORRECTLY HELD THAT THERE WAS NO WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) ERROR BY THE TRIAL COURT'S EXCLUSION OF SIX VENIREMEN, EACH OF WHOM UNAMBIGUOUSLY AND UNEQUOVICALLY ASSERTED IRREVOCABLE OPPOSITION TO IMPOSITION OF THE DEATH PENALTY.

In Witherspoon, this Court held, inter alia, that in a capital trial, no veniremen could be excluded for cause for his views regarding the imposition of the death penalty unless he

made unmistakably clear that he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed" at trial. 391 U.S. at 522-23 n.21. See also Boulden v. Holman, 394 U.S. 478 (1969); Davis v. Georgia, 429 U.S. 122 (1976); Adams v. Texas, 448 U.S. 38 (1980). As the court below held, the record reflects that each of the challenged veniremen were properly excluded because he or she would have been unable to serve as a fair and impartial juror consistent with Witherspoon principles.

Venireman Susan Jean Pace Herndon (Tr. 273-76), unambiguously and unequivocably stated five times that if selected as a juror, she would automatically vote against the imposition of the death penalty regardless of the evidence (Tr. 274-75). In direct response to defense counsel's question as to whether she could be persuaded to agree that there are some cases in which the death penalty is a possibility, she responded that she could not (Tr. 275). After further inquiry into the basis of Herndon's unequivocable resolve to vote against the death penalty in all circumstances, Hernondon responded affirmatively to defense counsel's broad and general question that she could do her duty as a juror (Tr. 275).

The trial court sustained the state's challenge for cause, to which defense counsel objected (Tr. 276). In response thereto, the prosecution succinctly pointed out that the general question asked of doing her duty as a juror had not included "[that] if it meant sentencing a man to death, could you follow that duty?" (Tr. 276). Defense counsel, supplied with the omitted language, declined to pursue the inquiry.

Petitioner contends that because the venireman, in response to a broad and general question which informed the juror of nothing, answered that she could do her duty and serve as a juror, the exclusion violated Witherspoon, in spite of the

venireman's previous five unambiguous and unequivocal responses that she would automatically vote against the death penalty, regardless of what occurred at trial. The court below found this contention untenable, expressly noting:

> In view of Herndon's repeated, firm, and unequivocal statements of irrevocable imposition of the death penalty under any circumstances, we are unable to say her limited reply that "she could do her duty as a juror" indicated any vacillation or equivocation in her previous statement of unalterable opposition to the imposition of the death penalty.

Porter v. Estelle, 709 F.2d at 948. Hernondon's responses were sufficient to permit her exclusion consistent with Witherspoon principles.

Venireman Zenon Martinez first stated that he had no objection to the range of punishment for capital murder (Tr. 555), but immediately thereafter stated that he could not sentence a man to death if the facts so warranted (Tr. 555); that based on his personal beliefs against the death penalty, he would vote against the death penalty regardless of the facts; and that his vote would be committed before he even heard the facts (Tr. 555-57). The prosecutor then explained to Martinez that capital jurors would have to answer statutory special issues, and that if all were answered in the affirmative, an automatic death sentence would be imposed, but if any special issue were answered in the negative, then punishment would be a life sentence (Tr. 557-591. Martinez responded that he would automatically vote "no" to one of the special issues to preclude imposition of the death sentence and that he was irrevocably committed to vote against the imposition of the death penalty (Tr. 559). The state made a challenge to the venireman, and defense counsel was permitted to examine him. Counsel then explained that citizens of the community have an important duty to serve a jurors if they qualify and inquired whether Martinez was willing to do his duty

as a citizen in serving on a jury, to which Martinez responded that he was (Tr. 561). Counsel then explained that jurors were bound to follow the law (Tr. 561); that some people may disagree with the law but that they could set aside their personal feelings and follow the law anyway (Tr. 562). Defense counsel then asked whether he could do his duty as a citizen and follow the law, to which Martinez responded that he could (Tr. 562). Defense counsel then specifically asked Martinez:

> Q: What I want to ask you is: Can you set aside your expressed convictions and your disbelief in the death penalty and do your duty as a citizen on this Jury?
>
> A: No, sir.

(Tr. 562). Thus, Martinez expressly stated that while generally he could set aside personal feelings and follow the law, he was unwilling to do this in a death penalty case. At this point, defense counsel began inquiring into what effect the death penalty would have on his deliberations, to which Martinez responded he would have it on his conscience and would worry about it (Tr. 563-64). The trial court finally sustained an objection to defense counsel's repetitive questioning and excused the venireman (Tr. 563-64).

Thus, the record clearly reflects that Martinez maintained that he would automatically vote against the imposition of the death penalty regardless of the facts. Although he could "do his duty" a citizen or juror, when his "duty" as a juror in a capital case was explained to him, i.e., that he would have to follow the law, he unequivocally asserted that he could not "set aside [his] expressed convictions and [his] disbelief in the death penalty and do [his] duty as a citizen on this Jury" (Tr. 562). Thus, his exclusion did not violate Witherspoon. See Porter v. Estelle, 709 F.2d at 949.

Venireman Alonzo Vaughn five times clearly and unequivocally testified that he would automatically vote against the imposition of the death penalty, no matter what the facts or circumstances revealed (Tr. 610, 611, 613). Upon questioning by defense counsel, however, he then stated that he could serve as a juror and was willing to listen to the evidence and "imagined" he could vote based on the evidence (Tr. 615-16). When the effect of affirmative answers to the special issues submitted pursuant to Article 37.071, V.A.C.C.P. was explained to him, however, he retracted this statement and unequivocably stated that he would automatically answer the special issues "no," knowing that an affirmative answer would result in the imposition of the death penalty (Tr. 618-19). Thus Vaughn unequivocally maintained that he would automatically vote against the imposition of the death penalty, and when the effect of his answers to the special issues was explained to him, he maintained that he could not answer in such a way that death would result. As such, his exclusion did not violate Witherspoon. See Porter v. Estelle, 609 F.2d at 949.

Venireman Rice five times testified that she would automatically vote against the imposition of the death penalty no matter what the trial revealed (Tr. 1098, 1100, 1102, 1103) and maintained that she would be compelled to answer the special issues "no" because affirmative answers would result in the imposition of death (Tr. 1100). When she once expressed uncertainty about whether she could base her verdict on the evidence adduced, the trial court overruled the state's challenge, stating "I think this is exactly what Witherspoon had in mind." (Tr. 1107-09). Upon further questioning, however, Rice then maintained that she could not be fair to both sides (Tr. 1110) and then twice maintained that she was irrevocably committed to vote against the death penalty, regardless of the facts and circumstances (Tr. 1111). Thus, although at one point

during the middle of the examination Rice stated that she did not know whether she could "do [her] duty and make whatever decision, based upon the evidence before [her] that the law might require" (Tr. 1107-08), her final responses that she could not, and would automatically exclude the death penalty, were unequivocal and unambigous. Petitioner's assertions that the venireman remained "mixed up" and equivocal are based upon a highly selective reading of the record, in which the venireman's final responses are ignored. Because Rice fell within that narrow group of veniremen discussed in Witherspoon, her exclusion was constitutionally permissible. See Porter v. Estelle, 709 F.2d at 948-49.

Venireman Esiquio Cantu five times maintained that he would automatically vote against the imposition of capital punishment, regardless of what the trial might reveal, that he was committed before trial to do so and that he would answer the puinshment questions "no." (Tr. 822, 823). While he once stated that he could listen to the facts and make a decision based thereon (Tr. 825), subsequent questioning by defense counsel revealed that this was in regard to guilt or innocence, not punishment (Tr. 825 L. 21-25). Further, in later response to this question, the venireman indicated that he was uncertain whether he could make a decision regarding guilt based upon the evidence (Tr. 826). Thus, in addition to the venireman's clear and unambiguous inability to consider the full range of punishment, it appears also that he could not be fair and impartial on the issue of guilt, another constitutionally permissible ground for exclusion. See Lockett v. Ohio, 438 U.S. 586 (1978).

Petitioner, once again, bases his argument that the venireman simply was unsure of his position on the death penalty on a selective and rather misleading representation of the record. The record clearly reflects that the venireman's final

uncertainty was in response to defense questions concerning the venireman's ability to decide the question of guilt or innocence, not punishment (Tr. 825-26). Significantly, it further reflects that defense counsel made no effort to further question the venireman concerning the application of his views to the death penalty. Thus, the record is clear that the above questioning only related to a finding of guilt. Cantu's uncertainty about rendering any decision as a juror related solely to guilt, and, indeed, had nothing to do with Cantu's position on the death penalty, defense counsel having abandoned questions relating to the "effect" of the death penalty on Cantu's jury service (Tr. 824-25). Thus, Cantu's' uncertainty regarding whether he could even vote to convict in no way rendered ambiguous or equivocal his previous five firm assertions that he would automatically vote against the imposition of capital punishment, no matter what the trial revealed, and would have to answer the special issues "no" because of his commitment. His exclusion was consistent with constitutional principles. See Porter v. Estelle, 709 F.2d at 949.

Finally, venireman Prue six times clearly and unequivocally testified that she would automatically vote against the imposition of capital punishment, regardless of the evidence revealed at trial, and that she would answer at least one of the special issues "no" to avoid the imposition of the death penalty (Tr. 1166, 1167, 1168, 1169). Although she once was asked whether she could "do [her] duty as a citizen," (Tr. 1170), as the prosecutor correctly pointed out in his objection to defense counsel's general and vague question, defense counsel's question never explained what this "duty" was or that it might entail returning a verdict which would result in death (Tr. 1170-71). Thus, the incomplete question of defense counsel was properly sustained. Given the opportunity to rephrase the question, and

indeed supplied by the prosecutor with the missing element, defense counsel declined to ask any further question. Thus, Prue's earlier unambiguous and unequivocal responses to the Witherspoon inquiry stand. Accordingly, her exclusion was not erroneous. See Porter v. Estelle, 609 F.2d at 949.

As the court below found, the exclusion of each of these veniremen presents no Witherspoon violation. As such, this Court should decline review.

III.

PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE TRIAL COURT'S REFUSAL TO ORDER PETITIONER EXAMINED BY A PSYCHIATRIST WHERE THERE WAS NO EVIDENCE TO RAISE A QUESTION OF COMPETENCY TO STAND TRIAL.

This Court announced in Drope v. Missouri, 420 U.S. 162 (1975) and Pate v. Robinson, 383 U.S. 375 (1966), that a separate procedural due process right to a competency hearing exists whenever the facts or events presented to the trial court raise a bona fide doubt as to the defendant's competency to stand trial. Whenever such a doubt is raised by the evidence, the trial court must, sua sponte, conduct an inquiry into the defendant's mental competency. The test for determining a defendant's mental competency was articulated by this Court in Dusky v. United States, 362 U.S. 402 (1960):

> [W]hether [the defendant] has sufficient present ability to counsel with his lawyer with a reasonable degree of rationale understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.

While no general standard for the nature or quantum of evidence necessary to trigger a competency procedure has been articulated by this Court, three factors have been found to be relevant in assessing competency: (1) the existence of a history of irrational behavior, (2) prior psychiatric opinion, and (3) the defendant's demeanor at trial. Drope v. Missouri, 420 U.S.

at 180. Applying the Pate-Drope guidelines to the facts of the case, the court below held that there was no evidence presented to the trial court raising a bona fide doubt as to Petitioner's competency and thus, the trial court had no constitutional duty to order a psychiatric examination and conduct an inquiry into Petitioner's competency to stand trial. (See Porter v. Estelle, 709 F.2d at 949-56 for a complete discussion of the evidence evaluated under the focus of the Drope guidelines.)

The court below carefully considered Petitioner's claim that the trial court refused to conduct the competency inquiry on the basis of defense counsel's refusal to allow the results to be used at the penalty phase, before rejecting it.

> The petitioner Porter nevertheless argues that the rejection of his constitutional claim on this basis is improper, because the state trial judge did not deny Porter a competency examination on such basis but, rather, because Porter's counsel refused to consent to its (possible) misuse against him in the penalty hearing. Porter also points out that the state conceded the need for a competency examination under existing law, so that if Porter had other showing to make (none has been suggested, however), the state's concession deprived him of that opportunity.
>
> Examination of the state trial judge's ruling and the colloquy preceding it does not indicate any agreement on this part that further psychiatric examination was indicated, merely a willingness to order one if the defendant requested one and an unwillingness to issue an order at that time as to its hypothetical future use in the penalty proceeding. Neither in the original federal habeas petition, see R.I., p. 54 at 61-62, nor at any other stage in the present state prosecution, post-conviction review, or federal habeas proceedings, has the contention been made that Porter was in fact incompetent to stand trial -- the complaint made is limited to whether the trial judge improperly inhibited Porter's Pate-Drope right to further inquiry as to his competency by refusing to order a competency examination subject to its non-use in the penalty proceedings. For purposes of federal habeas review, however, the predicate issue for affording Porter habeas relief depends upon whether the record as known to the trial judge raised a bona fide doubt as to Porter's

competency so as to implicate constitutional rights to a fair trial under Pate-Drope principles. For the reasons stated, no such predicate constitutional deficiency is shown in Porter's state trial, and we are unwilling to agree that the state's mistaken concession as to the need for a competency examination somehow created constitutional error where none is shown.

CONCLUSION

For these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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